10-27

IN THE SUPREME COURT OF FLORIDA

JACK ECKERD CORPORATION, et al.,

Petitioner,

vs. CASE NO. 68,528

WILLIAMSON CADILLAC LEASING, INC., et al.,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Jack Eckerd Corporation is referred to as "Eckerd" or "Plaintiff", its capacity below. Such references will include Travelers Insurance Company which is technically a petitioner as well, although Eckerd is the real party in interest due to the nature of its insurance through Travelers, who in essence administers Eckerd's insurance program.

The Appellees are referred to collectively as "Defendants", the capacity occupied in the trial court below, unless necessary to identify them particularly for clarity.

References to the record on appeal are designated by the prefix "R".

STATEMENT OF THE CASE

The dependent of an Eckerd employee was struck by a car owned by Defendant Williamson Cadillac Leasing, Inc. and driven by Defendant Alice L. Lipshaw (R 2). After Eckerd paid $250,000 in medical insurance benefits to the injured individual, it filed this action seeking subrogation from the Defendant tortfeasors and their insurance companies (R 2-5).

The trial court denied Defendants' motions to dismiss, but then entered summary judgment in favor of Defendants on both counts of Plaintiffs' amended complaint (R 34, 78). In entering summary judgment, the trial court necessarily ruled that the Florida collateral source statute bars a health insurance carrier from seeking subrogation against the third-party tortfeasor and his insurer, and explicitly held this constitutional. (R 48, 78).

Eckerd timely appealed (R 76-77) to the District Court of Appeal for the Third District, which affirmed in Jack Eckerd Corporation v. Williamson Cadillac Leasing, Inc., 485 So.2d 485 (Fla. 3d DCA 1986).

Eckerd petitioned this Court for discretionary review based, inter alia, on this Court's acceptance of jurisdiction in two cases cited by the Third District, Blue Cross and Blue

Shield of Florida, Inc. v. Matthews, S. Ct. Case No. 67,598, and Blue Cross and Blue Shield of Florida, Inc. v. Ryder Truck Rental, S. Ct. Case No. 67,591. This Court accepted jurisdiction in its order of September 8, 1986.

STATEMENT OF THE FACTS

After Eckerd's employee's dependent was injured by the Defendant tortfeasors, she filed a personal injury action in Dade County. (R 14-15) Eckerd paid the health policy limits of $250,000 in medical benefits to the injured party before she settled her suit with the Defendants. (R 4) The Defendants' settlement agreement specifically noted that the injured party had received $250,000 under Eckerd's medical policy and hence demonstrated that all of the settling Defendants were on notice that Eckerd was making claim against the Defendants for those amounts (R 15). The settlement agreement stated that the settlement ($1,000,000 in cash and a substantial structured payment through an annuity) were "in excess and exclusive of the Two Hundred and Fifty Thousand ($250,000) Dollars received from the Traveler's major medical policy." (R 15).

Eckerd filed this action seeking subrogation (R 5). The Defendants moved to dismiss for a variety of grounds, including the argument that the injured party (the original plaintiff) did not have a cause of action against the Defendants to which the Plaintiff health insurer could be subrogated (R 6). Plaintiff's memorandum in opposition to the Defendants' motions to dismiss specifically raised the question of the applicability of the collateral source rule, Section 627.7372, Florida Statutes (1981) (R 22-26). The trial court denied the motions to dismiss (R 34).

Section 627.7372 is entitled "Collateral sources of indemnity" and provides, in pertinent part (in 1981 and 1985):

> (1) In any action for personal injury or wrongful death arising out of the ownership, operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources paid to the claimant, and the court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source.
>
> (2) For purposes of this section, "collateral sources" means any payments made to the claimant, or on his behalf, by or pursuant to:
>
> > (c) Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

After answering, the Defendants moved for summary judgment on the grounds that §627.7372 eliminated plaintiff's subrogation rights (R 48). The trial court granted the motions for summary judgment on the ground that the collateral source statute eliminates health insurers' subrogation rights against third-party tortfeasors and their insurers, and is constitutional (R 48, 78).

ISSUE ON REVIEW

IS THE COLLATERAL SOURCE RULE (§627.7372) CONSTITUTIONAL AS APPLIED TO HEALTH INSURANCE CARRIERS WHEN IT ABOLISHES THEIR RIGHT TO SUBROGATION WITHOUT PROVIDING A SUBSTITUTE REMEDY?

SUMMARY OF THE ARGUMENT

Eckerd demonstrates that prior to the passage of the collateral source statute, health insurers unquestionably had the right to be subrogated against the tortfeasors for amounts the insurers paid to injured insureds. The collateral source statute on its face eliminates the insured's right to recover from a tortfeasor any sums which the insured has received from a collateral source, including a health insurer. Various district court opinions have gone a step further and held that it implicitly eliminates the health insurer's subrogation rights. They have held this is constitutional, even though those rights are not replaced with any other remedy.

The Florida Supreme Court has suggested that the collateral source statute might be applied to automobile insurers based on the theory that, eventually, all automobile insurers will benefit from the collateral source rule since cases where one company's insured is at fault will balance out the loss of subrogation rights in other cases where that company would have recovered. In other words, the collateral source rule as applied to automobile insurers may result in a situation where "it all comes out in the wash."

What the district courts of appeal have overlooked in these cases, however, is that health insurers will never benefit from the collateral source rule. Thus, their right to subrogation has been completely abolished without any

remedy being substituted. This is an unconstitutional deprivation of access to courts guaranteed by the Florida Constitution.

Eckerd suggests two alternatives to holding the collateral source statute unconstitutional as applied. First, it urges a construction of the statute that would not eliminate health insurer's subrogation rights. Second, Eckerd proposes recognizing a direct action by health insurers for automobile tortfeasors' negligence. This Court recently recognized those tortfeasors' right to seek recovery from subsequent medical tortfeasors who aggravate automobile injuries. It would indeed be ironic to allow auto tortfeasors such recoveries while making them immune from medical damages caused by their negligence where the injured party has health insurance.

ARGUMENT

THE COLLATERAL SOURCE RULE (§627.7372) IS UNCONSTITUTIONAL AS APPLIED TO HEALTH INSURANCE CARRIERS SINCE IT ABOLISHES THEIR RIGHT TO SUBROGATION.

A. The collateral source rule and subrogation.

Florida's collateral source statute, Section 627.7372, Florida Statutes (1985) provides in pertinent part that in any action for personal injury arising out of the use of a motor vehicle, evidence of all payments from collateral sources made to the claimant shall be admitted and the jury shall deduct from any award those benefits received by the claimant. §627.7372(1), Florida Statutes (1985). The statute defines "collateral sources" to include any payments made to the claimant pursuant to any contract of any group to pay for medical services. §627.7372(2)(c), Florida Statutes (1985). 1/

Prior to the passage of statutes reforming automobile insurance in the 1970's, an injured automobile claimant's insurer - whether an insurer under an automobile or health policy - had a recognized right to be subrogated to the

1/ The 1981 and 1985 versions of the collateral source statute reflect moderate amendments to the 1977 version considered in Purdy, but those amendments are not significant for the purposes of the issues presented in this case.

claimant's recovery. 2/ E.g., Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1328 (Fla. 1981); Atlantic Coast Line Railways v. Campbell, 104 Fla. 274, 139 So. 886, 888 (1932).

The collateral source rule eliminates an injured party's right to recover for losses paid by his health insurer, and - under the construction given it by several district courts of appeal - would eliminate the health insurer's right to subrogation.

B. The collateral source statute should be construed so as not to eliminate health insurers' rights to subrogation.

As discussed in Part D below, the district courts of appeal in a series of cases have ultimately construed the collateral source statute as barring a health insurer's subrogation rights against automobile tortfeasors. They essentially reasoned that: (1) the health insurer's right against a tortfeasor is derivative of its insured; (2) the statute bars the insured's right against the tortfeasor for sums received by the insured from its health insurer and, (3) therefore, the statutory bar necessarily extends to the health insurer's action against the tortfeasor. Eckerd argues in Part D that this result has been reached by a

2/ Subrogation is an equitable doctrine which allows a party required to pay a legal obligation owed by another to step into the shoes of the injured party and assert the latter's original claim against the wrongdoer. Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980).

misapplication of this Court's decision in Purdy, which only addressed the ability of the insured/plaintiff to recover from the tortfeasor for damages for which he had been reimbursed by a collateral source. Eckerd accepts this holding. Here, Eckerd seeks to enforce its common law subrogation right against the automobile tortfeasor and his insurers.

Before demonstrating that the district court of appeals' construction of Section 627.7372 is unconstitutional as applied, Eckerd suggests that the necessity of holding the statute unconstitutional can be avoided by a narrower construction. Of course, an available interpretation of the statute which would uphold it must be adopted over a construction that would render it unconstitutional. E.g. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984).

As noted in Part A above, the insurers' common law right to recover subrogation from a tortfeasor has long been recognized. However, some lower court decisions have focused on language that the insurer's right of action is derived from the right of the insured. Atlantic Coastline Railways v. Campbell, supra. The courts' reasoned that since Section 627.7372 barred the insured from recovering from the tortfeasor for any sums he has been reimbursed by the insurer, that the subrogated insurer could have no greater rights.

However, there is another interpretation of the statute, since not every defense which is available against the insured will bar the insurer from enforcing its subrogated claim.

In Holyoke Mutual Insurance Company v. Concrete Equipment, Inc., 394 So.2d 193, 197 (Fla. 3d DCA 1981), review denied, 402 So.2d 609 (Fla. 1981), the court held that the subrogee "inherits only an impediment to the cause of action..., not an impediment personal to the subrogor." (cite omitted) In Holyoke, the insurer, as subrogee of its insured ABC Pools, Inc., sought to enforce a claim against Concrete Equipment. Holyoke filed the suit in its own name, since ABC was no longer in existence as a corporation. The trial court (erroneously) dismissed the suit on the ground that it could be brought only in ABC's name. After Holyoke amended to sue in ABC's name, the trial court dismissed the amended complaint on the ground that a dissolved corporation had no standing to sue. The Third District held that Holyoke could sue in its own name, and that the disability of a dissolved corporation was not an impediment to Holyoke's action, because it was an impediment personal to the subrogor.

Section 627.7372 should be similarly construed. It does not, by its terms, prevent an action by a subrogee. Rather, it prevents double recovery by the injured party himself. The statute does not constitute a bar inhering in the cause of action. This is clear by the fact that the injured party

has an absolute right to decline any benefits under his insurance policy or other collateral source, and seek damages which might have been paid by a collateral source, from the tortfeasor. Purdy, supra, 403 So.2d at 1329. Thus, the collateral source statute should be construed to operate only as a personal impediment to double recovery by the injured party.

The Legislature did not explicitly eliminate Eckerd's subrogation rights in Section 627.7372, and nothing in the statute indicates the Legislature intended such a change in the law of subrogation. Here, Eckerd's subrogation rights have been eliminated because of the lower courts' construction of a statute intended to act in one area of the law (eliminating double recovery), to affect a vastly different area (subrogation). A construction that the statute does not affect subrogation would not only produce the intended effect, but would preserve Eckerd's constitutional subrogation right. By contrast, adopting the lower courts' construction which eliminates Eckerd's subrogation right, requires holding the statute unconstitutional.

C. The unconstitutional abolition of health insurers' subrogation rights.

It is obvious that Eckerd's rights to subrogation, as a health insurer, have been abolished by the district courts' application of the collateral source statute and that these

health insurers have not been provided any substitute remedy. Kluger v. White, 281 So.2d 1 (Fla. 1973) is the landmark case holding that a complete abolition of a prior right of action violates the right of access to courts as guaranteed by the Florida Constitution, 3/ absent either "a reasonable alternative to protect the rights of the people of the state to redress for injuries" or a legislative showing of "an overpowering public necessity for the abolishment of such right." In the context of health insurers, there has clearly been a complete abolition of their right to subrogation without any alternative to protect their rights. 4/

The plight of the health insurer presents a much stronger case for the denial of access to the courts than was presented in Kluger v. White. In Kluger this Court struck down a statute abolishing the right of a party to sue for property damage to his vehicle arising from an automobile accident unless the property damage exceeded $550 (or the

3/ "The courts shall be open to any person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, §21, Fla. Const.

4/ In moving for summary judgment, Defendants made no showing of an "overpowering public necessity" for the abolishment of a health insurer's rights. As discussed below, even if reducing litigation among automobile insurers is enough to justify a collateral source statute which has not totally abolished their rights since they still receive some benefit from the collateral source rule, it provides no basis for suggesting some overwhelming need to prevent health insurers from recovering from tortfeasors.

party had chosen not to insure for property damage). The Court struck down this portion of the Florida Automobile Reparations Act, finding that it was unconstitutional based on the denial of the access to courts for a plaintiff who had suffered such damage to his car. Clearly, if the elimination of a right to recover $550 for property damage to an automobile is a denial of the right of access to courts, then depriving Eckerd of its subrogation right of $250,000.00 from Defendants, without providing any alternate remedy, is a much more egregious constitutional denial.

In Purdy the injured plaintiffs (individual insureds) were challenging the constitutionality of the collateral source statute on the grounds that it violated their guarantee of access to courts. This Court held that the elimination of a claimant's ability to recover from the tortfeasor sums already recovered from a collateral source did not abolish any previous right since prior to the statute the plaintiff would not have been entitled to keep the full amount recovered in the lawsuit. That is, the plaintiff's insurer had a right of subrogation as to those previous payments. The Court concluded with regard to the collateral source statute and the personal injury protection payments statute (PIP) that "these sections merely prevent injured plaintiffs from recovering monies which, equitably speaking, belong to their insurers." 403 So.2d at 1329.

Thus, Purdy was not specifically addressing the question of the insurer's right of subrogation which had effectively

been eliminated by the collateral source rule. However, additional comments in Purdy are instructive. The Court examined the state of the law before the collateral source rule, a period in which there was apparently a great deal of litigation between automobile insurance carriers. 403 So.2d at 1328-29. The Court discussed the "no-fault" concept of the Florida Automobile Reparations Reform Act and the fact that auto insurers did not recover PIP benefits they paid from other auto insurers. The Court concluded with regard to such automobile insurers:

> The benefits obtained by the tortfeasors will enure to their insurance carriers. Supposedly, these benefits will eventually be shared by all carriers without the need of litigation. [cite omitted]. This should result in lower premiums.

403 So.2d at 1329. Obviously, this logic has no applicability to health insurers who will never benefit from the inability to recover from auto insurers. Purdy simply did not address the effect of the collateral source rule on the health insurers' right of subrogation, since it was not an issue in the case.

D. District courts of appeals decisions.

Subsequent district court decisions, however, have read Purdy to bar a health insurer's right to seek recovery from automobile tortfeasors and their insurers. This is particularly disturbing since this Court's opinion in Purdy rested in significant part upon its observation that the injured plaintiffs were not giving up the right to "the full

amount" of their recovery since that money actually belonged to their insurers:

> "This argument assumes that common law plaintiffs were allowed to keep the full amount of money they recovered in a lawsuit, which was not the case. Their right of full recovery was subject to their insurer's right of subrogation. That is, as a matter of equity, it was the insurers who were entitled to bring suit against tort-feasors for reimbursement of any payments made to an insured." 403 So.2d at 1328.

The health insurers this Court said in Purdy were entitled to these monies are now before the Court asking for them.

The district courts, through a misapplication of Purdy, have used it to deny monies to the health insurers that Purdy implicitly recognized should receive them. The lower court opinions progressing to this conclusion, while incorrect, can be traced. The first case applying the rationale of Purdy did so to bar an automobile insurance company's attempt to enforce its "subrogation rights" against its own insured. The court in Prince v. American Indemnity Company, 431 So.2d 270 (Fla. 5th DCA 1983) reasoned that in light of the collateral source statute, any money the injured plaintiff would have received must not have been money to compensate for items paid by a collateral source (her insurance company), so that her company had no right to recover those sums from her. Implicitly recognizing the Purdy "trade-off" rationale between automobile insurers which might justify eliminating their subrogation rights, the court noted that such a result would be "incomprehensible" in a case of a health or medical policy having no connection whatever with

the automobile coverage. 431 So.2d at 272, n.2. 5/

Molyett v. Society National Life Insurance Co., 452 So.2d 1114 (Fla. 2d DCA 1984), simply followed Prince, which it noted contained the same issue of an insurance company's ability to recover from its own insured as in Prince. The opinion did not discuss any distinction between an automobile insurer and a health insurer vis-a-vis the abolition of subrogation rights. Namely, the constitutional issue presented in the instant case was not discussed in Molyett.

In Prince and Molyett, the insurance companies were not actually seeking subrogation, but enforcement of subrogation claims against their own insureds in the form of reimbursement. However, the rationale of those cases was next applied to health insurers seeking to directly enforce their subrogation rights against the automobile tortfeasors and their insureds. Although Blue Cross' effort at recovery in the Third District case on petition before this Court was based indemnity, the opinion contained dicta that a party's right of subrogation was limited by any impediment in the injured party's claim. The dicta concluded that therefore the insurer had no right of subrogation against the wrongdoer.

5/ The Fifth District stated:

> "We must admit the difficulty in understanding the economic or social purpose of the collateral source rule. In circumstances such as these, the tortfeasor's insurance carrier escapes liability and the injured party's carrier pays. Even more incomprehensible would be the case where the health or medical policy had no connection whatever with the automobile coverage."

Blue Cross & Blue Shield of Florida, Inc. v. Ryder Truck Rental, Inc., 472 So.2d 1373 (Fla. 3d DCA 1985). However, the cases cited therein as support addressed the situation where there was an impediment to the cause of action itself, such as an adverse judgment against the insured in a previous action based on the claim. 6/

The First District applied a similar rationale in Blue Cross & Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985), in holding that Blue Cross's right was a "derivative right" and then summarily holding that since it "stands in the shoes" of its insured, it succeeds only to those rights held by its insured. This again overlooks the rationale of Purdy and essentially holds that rights can be abolished in the face of the constitutional guaranty of access to courts, simply by holding they are "derivative rights". 7/

This Court has implicitly recognized in the context of the "no-fault" act that an access to the courts analysis is applicable to derivative claims. In Faulkner v. Allstate Insurance Company, 367 So.2d 214 (Fla. 1979), this Court

6/ See Jones v. Bradley, 366 So.2d 1266 (Fla. 4th DCA 1979). Indeed, the district court missed the significance of its earlier decision in Holyoke, as discussed above, that personal defenses do not inhere in the cause of action.

7/ The Second District followed Matthews and Ryder without further elaboration in Blue Cross & Blue Shield of Florida, Inc. v. King, 479 So.2d 278 (Fla. 2d DCA 1985), appeal dismissed, 482 So.2d 347 (Fla. 1986).

initially noted that Mrs. Faulkner's claim for loss of consortium was derivative and wholly dependent on her husband's ability to recover for his injuries in an automobile case. This Court went on to note that:

> The "access to the court's" argument which prevailed in Kluger is not applicable since the spouse's claim is not abolished. It is merely limited, for reasons of sound public policy, to cases in which the injured spouse has met the threshhold requirements."

367 So.2d at 217. Thus, this Court's opinion in Faulkner clearly indicates that where a derivative claim is being abolished, that a Kluger "access to courts" analysis is required. In the context of these health insurers, their rights are not being limited, but are clearly being completely abolished. And they are receiving nothing in exchange, contrary to the situation of automobile insurers.

Unlike the situation where automobile insurers who lose subrogation rights in one accident will be benefited by the inability of another insurer to seek subrogation from them in a different accident where their insured is at fault, the health insurer never benefits from the loss of subrogation. That is, no automobile insurers would ever be seeking subrogation from a health insurer for injuries caused by its insured in an automobile accident. There is no justification for imposing damages caused by negligent driving upon health insurers through an unconstitutional deprivation of their subrogation rights.

E. The collateral source rule may be held constitutional as applied to health insurance carriers if this Court recognizes a direct right of action by health insurance carriers against tortfeasors.

As discussed above, the district court's construction of the collateral source rule eliminates health insurers' long-standing common law subrogation right. As Kluger indicates, unless a reasonable alternative to the elimination of this subrogation right is provided, the collateral source rule is unconstitutional as applied to health insurers. An available alternative is to permit a direct action by health insurers against tortfeasors. This direct action would not subject the defendant tortfeasors to any new liability, since they have traditionally been liable for medical damages their negligence caused.

Florida courts have long recognized that the operator of a motor vehicle incurrs a legal duty to exercise reasonable care for the safety of others. See, e.g., Nelson v. Ziegler, 89 So.2d 780 (Fla. 1956); Instruction 4.10, Florida Standard Jury Instructions (1985). Florida courts define a defendant's duty by determining if a plaintiff is in the "zone of risks" reasonably forseeable by the defendant. Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA 1981) review denied, 411 So.2d 380 (Fla. 1981); approved in Stevens v. Jefferson, 436 So.2d 33, 35 (Fla. 1983).

Crislip also holds that it is not necessary for the tortfeasor to be able to forsee the exact nature and extent of the injuries, but only "that some injuries will likely

result in some manner as a consequence of his negligent acts." 401 So.2d at 117, original emphasis. Unquestionably, it is foreseeable that if tortfeasors operate or permit a motor vehicle to be operated so as to cause injury to another person, that person will incur medical costs which will be paid by that person or the person's health insurer.

To recognize a direct cause of action for health insurers in this situation would not actually extend a defendant automobile tortfeasor's duty or zone of risk. Prior to the collateral source rule, the same medical expenses the health insurers seek to recover here were recoverable by the injured party directly from the tortfeasor. The direct cause of action would not extend the tortfeasor's zone of risks, but merely substitute the health insurers for the injured victim of a tortfeasor's negligence. Thus, Eckerd does not ask this Court to award any damages that would not traditionally have been awarded.

In discussing the concept of duty, Professor Prosser states:

> Various factors have undoubtedly been given conscious or unconscious weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others. Changing social conditions lead constantly to the recognition of new duties. No better statement can be made, than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.

Prosser and Keeton, Law of Torts, p. 359 (5th Ed. 1984).

Reevaluating the concept of duty is evident in this Court's recent decision in Champion v. Gray, 478 So.2d 17, 20 (Fla. 1985), modifying the "impact rule" to allow recovery for a "significant discernable physical injury when such injury is caused by physical trauma resulting from a negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing the injury, is forseeably injured." Similarly, health insurers are clearly forseeably injured by automobile tortfeasors. Moreover, the direct action suggested here is not even a departure of the nature approved in Champion, since auto tortfeasors have traditionally been responsible for medical damages they cause.

The concept of recognizing a direct action to replace health insurers lost subrogation rights is analagous to this Court's recent recognition of a right of subrogation in Underwriters at Lloyds v. City of Lauderdale Lakes, supra. In Underwriters, the Court held that an initial tortfeasor (automobile driver) could sue a successor tortfeasor (a malpracticing doctor) in subrogation for aggravating the original injury. The Court reasoned that "under this doctrine the financial burden is equitably apportioned among the responsible parties, and negligent doctors can no longer escape liability for their actions." Id. at 704. If Florida is prepared to let tortfeasor drivers sue in subrogation to

reduce their responsibility for damages, then completely innocent health insurers should be permitted to sue those tortfeasor drivers and their insurers - so that they "can no longer escape liability for their actions."

In the words of Professor Prosser, it is time to recognize a duty on behalf of negligent automobile drivers that permits health insurers to sue directly for payments they have been required to make to their insureds. Recognition of this duty would render the collateral source statute constitutional and would shift the loss and blame to the party responsible. This would not constitute a major departure from traditional law holding negligent automobile drivers responsible for the medical losses of people they injure.

CONCLUSION

The Defendant tortfeasors and their insurers admittedly have not paid for the significant medical damages they caused which were paid by Eckerd as a health insurer. If Eckerd's subrogation rights are deemed to have been abolished by the application of the collateral source statute, then, since no alternative remedy was provided to the health insurers, this abolishment of subrogation rights constitutes a denial of access to courts and is unconstitutional. For these reasons, this Court should construe Section 627.7372, Florida Statutes so as not to bar subrogation by Eckerd, or should declare it unconstitutional as applied to health insurers and reverse

the summary judgment. In the alternative, this Court should recognize a direct action in negligence by health insurers against automobile tortfeasors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to Joseph M. Loughren, Esq., Wicker, Smith, et al, P.O. Drawer 14460, Ft. Lauderdale, Florida 33302; Christopher R. Fertig, Esq., 750 Southeast 3rd Avenue, Suite 200, Ft. Lauderdale, Florida 33316; and Michael J. Murphy, Esq. 4601 Ponce de Leon Blvd., Suite 100, Coral Gables, Florida 33146, this 2nd day of October, 1986.

Attorney

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